Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Retention by Broadcasters of Program Recordings	)	MB Docket No. 04-232
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To: The Commission

COMMENTS OF BARNSTABLE BROADCASTING, INC.

Barnstable Broadcasting, Inc. ("Barnstable") hereby submits its comments in response to the FCC's July 7, 2004 Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.[1] Barnstable is a privately held, mid-sized group radio station operator, and is the licensee of fifteen radio stations located in Virginia, North Carolina, South Carolina, and New York. Barnstable opposes the Commission's proposal to require broadcasters to retain real-time recordings of all content aired on their stations (at least during some time periods) because such a requirement would have a significant chilling effect on speech and would impose substantial burdens and costs, and is far greater than is needed to serve any legitimate government interest. At most, the FCC should adopt a rule that limits any real-time recording requirement to material that originates from a station's studio. Rather than requiring duplicative recording of songs, commercials and other pre-recorded content that many broadcasters already generally retain in recorded format in the normal course of business or that are otherwise broadly and conveniently available to any interested party, the Commission should deem it sufficient for broadcasters to keep logs of these items instead.

[1] *In the Matter of Retention by Broadcasters of Program Recordings*, MB Docket No. 04-232, FCC 04-145 (rel. July 7, 2004).

I. THE RECORDING AND RETENTION PROPOSAL WILL SIGNIFICANTLY CHILL SPEECH.

In the *NPRM*, the Commission acknowledges that it must be "cautious" in this area because "free speech rights are involved" and seeks comment on whether its proposal to require broadcasters to record programming "raise[s] any First Amendment issues."[2] Barnstable submits that the FCC's recording and retention proposal raises significant concerns under the First Amendment. The *NPRM* itself makes abundantly clear that the goal of any recording requirement would be to facilitate the enforcement of complaints "based on program content."[3] It is settled, however, that the Commission "*cannot* control the content or selection of programs to be broadcast" over the public airwaves.[4]

Although the proposed recording and retention requirement creates no new content restrictions and does not establish formal mechanisms for the enforcement of existing rules governing broadcast content, its adoption would undoubtedly "provide[] ample opportunity for substantial chilling of First Amendment freedoms" and "serve[] to facilitate those exercises of power and persuasion which create the chill."[5] Courts are quite aware that "a regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others,"[6] and have not hesitated in the past to invalidate even informal attempts to influence program content through "raised eyebrow" regulation.[7] It is absolutely the case that

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[2] *Id.* ¶ 10.

[3] *Id.* ¶ 7.

[4] *Community-Service Broad. of Mid-America, Inc. v. FCC*, 193 F.2d 1102, 1110 (D.C. Cir. 1978) (emphasis added).

[5] *Id.*

[6] *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2000).

[7] *Writers Guild of Am., W., Inc. v. Am. Broad. Co.*, 423 F. Supp. 1064 (C.D. Cal. 1976) (finding First Amendment violation where FCC, joined by networks and professional associations, pressured local stations to set aside a

broadcasters, if required to retain recordings of program material for possible government inspection, will feel compelled to curb their program offerings in an effort to avoid official investigation.[8]

Moreover, this chilling effect will be felt far more broadly than is necessary to serve the FCC's asserted primary interest in curbing programming that may run afoul of the prohibitions on obscenity, indecency, and profanity or otherwise violate the Commission's rules.[9] If adopted, the FCC's proposal will lead broadcasters to avoid *all* programming that might be deemed controversial, including, for example, programs concerning issues that deeply divide their local communities, even though that is precisely the type of programming that directly *furthers* the Commission's asserted goal in promoting localism.[10] Broadcasters will feel compelled to take these steps not only for fear of investigation by the FCC, but also due to concerns that individuals who disagree with viewpoints expressed during station programs may attempt to utilize the availability of recordings to further private goals, including civil litigation. Apart from this likely reaction from broadcasters themselves, local public figures and members of the general public will for the same reasons face a powerful disincentive to appear on unscripted programs broadcast by local stations. Public affairs programs, informal broadcast interviews, and even non-issue related forums such as on-air "guest DJ" appearances, all of which are popular and effective forms of localizing broadcast content, will under the proposed

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"family hour" for programming suitable for viewing by children), *vacated on other grounds*, 609 F.2d 355 (9th Cir. 1979); *see Writers Guild of Am.*, 609 F.2d at 365-66 (noting that "the line between permissible regulatory activity and impermissible 'raised eyebrow' harassment of vulnerable licensees is . . . exceedingly vague"); *Consol. Edison Co. v. Fed. Power Comm'n*, 512 F.2d 1332, 1341 (D.C. Cir. 1975) ("Regulation through 'raised eyebrow' techniques seems inherent in the structure of most administrative agencies, combining as they do both policy-making and adjudicative functions.").

[8] *See Community-Service Broad.*, 197 F.2d at 1116.

[9] *See NPRM*, ¶¶ 1, 7.

[10] *See, e.g., In the Matter of Broadcast Localism*, MB Docket No. 04-233, FCC 04-129 (rel. July 1, 2004).

requirements be negatively affected. Free, open, active, and informal discussion and debate on the airwaves will be more difficult to encourage when prospective participants believe their comments will by government regulation be recorded and retained for subsequent use and manipulation by any interested party. The significant burdens, discussed in Section II below, that the FCC's proposal will impose, also will require the diversion of station resources away from beneficial programming, including news and public affairs.

Because the recording and retention requirement proposed in the *NPRM* would facilitate a "raised eyebrow" scheme that will result in a substantial chilling effect on speech, including speech that directly furthers goals that the lie at the heart of the Commission's recent regulatory program, the FCC should decline to impose it for this reason alone.

II. THE RECORDING AND RETENTION PROPOSAL WILL IMPOSE SUBSTANTIAL BURDENS AND IS OVERBROAD.

The FCC acknowledges in the *NPRM* that its proposal will impose costs on broadcasters and seeks comment on the extent of those burdens.[11] The adoption of a requirement that broadcasters record in real-time *all* content aired on a station – whether 24 hours a day or only between 6 a.m. and 10 p.m. – will, indeed, impose significant burdens without providing commensurate benefits to the public. The per-station expenditures needed to develop the capability to record in real-time all program content will be considerable. Additional costs will be imposed by the need to acquire additional hard-drive space or other capacity to retain the required recordings, equipment maintenance costs, and the need to regularly upgrade equipment as technology changes over time. Stations also will have to designate employees, and potentially acquire additional personnel, to monitor the recording equipment in order to ensure compliance,

[11] *NPRM*, ¶ 9.

and will also have to develop a mechanism for, and bear the costs of, retrieving recordings in the event of a Commission inquiry.

These costs – which under the FCC's proposal will be imposed on every single broadcast station in the country – must be balanced against the potential benefit that a recording and retention requirement will produce. There is simply no evidence that the Commission's current enforcement mechanism, which relies on the public to provide a tape, transcript, or significant excerpt of programming claimed to run afoul of the prohibition on obscene, indecent, and profane programming, is ineffective. Indeed, in the *NPRM* itself the FCC indicates that it dismisses only approximately one percent of the complaints that it receives based on the complainant's failure to provide what the Commission's rules require.[12] This clearly demonstrates that the FCC's rules can be – and indeed are now being – enforced without a recording and retention requirement.

The paucity of cases in which, following investigation, the Commission has issued a Notice of Apparent Liability ("NAL") determining that a broadcaster has aired indecent programming, provides further evidence that the burdens associated with an across-the-board recording and retention requirement vastly exceed any public benefits that might result. Between 2000 and 2002, the FCC received 14,379 complaints, but issued NALs in only 24 cases (two of which were later rescinded), meaning that only slightly more than one-tenth of one-percent of complaints resulted in a finding of actionable indecency. The 22 NALs issued during that time period pertained to broadcasts on 20 different stations, while as of December 31, 2002 there were *15,641* commercial and non-commercial radio, television, and Class A stations in existence.[13]

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[12] *Id.* ¶ 6 n.8.

[13] *See* Broadcast Station Totals as of December 31, 2002, http://www.fcc.gov/mb/audio/totals/bt021231.html#START (visited July 21, 2004).

Would the Commission really suggest that the violations of 20 stations over two years justify the burden that 15,621 other broadcast stations undertake exhaustive, 365 day a year recordings of their broadcast content?

These figures further establish that the FCC's across-the-board proposal is vastly overbroad and that the burdens that it will impose substantially outweigh any public benefits that might result. The proposal advanced in the *NPRM* is a two-ton solution to a one-ounce problem and should not be adopted.

III. IF THE FCC NEVERTHELESS DETERMINES THAT A RECORDING AND RETENTION REQUIREMENT IS APPROPRIATE, THERE ARE FAR LESS BURDENSOME WAYS TO FASHION ITS RULE.

If, notwithstanding the considerable chilling effect that a recording and retention requirement would have on protected First Amendment speech and the lack of any demonstrated need to impose such a requirement on all broadcast stations across the country, the Commission concludes that it nevertheless should mandate recording and retention, Barnstable submits that there is a far less burdensome means to accomplish the FCC's asserted goal. As noted above, the Commission proposes in the *NPRM* to require broadcasters to retain for a limited period of time recordings of all material aired either between (1) the hours of 6 a.m. and 10 p.m. or (2) 24 hours a day.[14] The FCC's proposal, however, overlooks three critical facts, which taken together render a real-time recording requirement vastly overbroad, regardless of the time period during which it applies.

First, the Commission's proposal ignores the fact that the vast majority of content aired on most broadcast stations is itself pre-recorded and is already retained by broadcasters. With respect to radio stations in particular, all songs are already, of course, in recorded form and generally available to the public: they are, after all, popular recordings. Commercials too are

[14] *NPRM*, ¶ 7.

recorded materials, and are already retained by broadcasters for a considerable period of time. There is simply no reason to require broadcasters to re-record songs, commercials or other material that is already recorded and retained.

Second, the FCC's proposal disregards the fact that there is technology already in place at a large number of radio stations across the country, including those licensed to Barnstable, which logs the date and time at which a particular song is played.[15] Broadcasters also already generally log the date and time at which commercials are aired to demonstrate compliance with ad sales contracts.[16] A simple logging requirement would enable a radio station faced with a Commission inquiry regarding a pre-recorded song or commercial to determine what material was aired and when, rendering an across-the-board recording requirement unnecessarily duplicative.

Third, the FCC's proposal overlooks the availability of digital "skimmer" technology that automatically records any material that is broadcast from a station's studio over the microphone. This material may then be stored digitally and maintained separate and apart from pre-recorded broadcast material such as popular songs and recorded commercials. In marked contrast to the technology that would be needed to comply with a requirement to record *all* program material, this technology requires only a relatively modest investment. The availability and relative low cost of this technology, as is the case with respect to the reality that most material aired on radio stations is already recorded, renders the Commission's proposal to require real-time recording of everything that is broadcast vastly overbroad and entirely unnecessary.

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[15] The program used by Barnstable's stations is called "Selector." *See* http://www.rcsworks.com/products/selector/ (visited Aug. 11, 2004).

[16] Recorded public service announcements and other materials that are aired on more than one occasion are also already logged or could be with minimal expense.

Accordingly, if the Commission determines that some type of recording and retention requirement is needed, it should require broadcasters merely to: (1) retain pre-recorded materials, including songs and commercials for a minimal period of time; (2) retain logs of the date and time at which pre-recorded materials are aired for the same period of time; and (3) record in real-time only originally-produced material that is broadcast from a station's studio over the microphone and retain that material for a similarly limited period of time. This type of requirement would allow the Commission to achieve its asserted goals while limiting the burdens that broadcasters would be forced to bear.

IV. CONCLUSION

For the reasons set forth above, the FCC should decline to impose a recording and retention requirement upon broadcasters because of the significant chilling effect that such a requirement would have on protected First Amendment speech and the substantial burdens that it would impose on broadcasters. If, notwithstanding these objections, the Commission nevertheless concludes that some type of recording and retention requirement is appropriate, it should adopt a rule that takes advantage of practices already in place at many radio stations across the country and available technology in order to reduce the burdens on broadcasters. As shown above, in light of existing practices and available technology, there is absolutely no basis to require broadcasters to record in real-time and retain all material that is aired on their stations, whether during designated time periods only or 24 hours a day.

Respectfully submitted,

/S/

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